Golden Screen Cinema Sdn Bhd v MTM Realty Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–665 OF 2007 AND W-02–1147 OF 2007
GOPAL SRI RAM, HASAN LAH AND ABU SAMAH JJCA
22 APRIL 2008

Civil Procedure — Injunction — Injunction to restrain sale of property — Tenancy agreement clause of first right of refusal disputed — Whether there was inordinate delay in seeking injunction — Whether property had special value — Whether proper approval from owner obtained — Whether second defendant proved to be bona fide purchaser

This was the plaintiff's appeal against the decision of the High Court judge granting an injunction restraining the first defendant from selling or disposing of the property in question to the second defendant. The plaintiff was the tenants of the foyer of two cinemas ('the property') in Sungei Wang Plaza owned by the first defendant. The tenancy agreement between the plaintiff and the first defendant contained a clause which gave it a right of first refusal in the event that the first defendant intended to sell the property. The cinemas were eventually closed and the first defendant offered to sell it to the plaintiff for RM16m. However, the agreement to sell the property to the plaintiff was terminated on the ground that the plaintiff disregarded the timeline provided in the clause of the agreement. The plaintiff took out a writ and simultaneously by summons moved for an injunction which was granted against the defendants and eventually became the subject matter of the present appeal. Among the issues to be determined by the court were that: (i) whether there was an inordinate delay in seeking the injunction; (ii) whether the trial judge overlooked the fact that there was nothing special about the property; (iii) whether the obligation was upon the plaintiff to obtain approval from the owner of the building for the works it intended to carry out; and (iv) whether the second defendant was a bona fide purchaser and therefore should be allowed to proceed with the purchase of the property.

Held, dismissing the appeals with costs:

(1) In the instant case, the facts showed that the judge had not considered the delay to have been such a nature to disentitle the plaintiff to relief and had exercised his discretion accordingly. As the plaintiff had an

ongoing relationship with the first defendant, the plaintiff was right in its reluctance to commence an action earlier than it did. Therefore, nothing turned upon the issue of delay as the plaintiff had moved swiftly enough to protect its interest soon after the sale of the property to the second defendant (see para 6).

(2) Having regard to the special circumstances of this case, the property had indeed a special value. By reason of its location and its popularity with the general public, the building in which the property was located itself carried a special value and so must the property itself. Therefore, there was no merit on the ground of complaint that there was nothing special about the property (see para 7).

(3) Further, it was clear from the evidence that the plaintiff had written to the owners, who in turn had instructed their solicitors to reply the letter to the first defendant. Hence there was no merit in the contention that the judge had overlooked the fact that the obligation was upon the plaintiff to obtain the approval for the works intended to be carried out (see para 8).

(4) Moreover the evidence did show that the second defendant was in fact aware of the transaction between the plaintiff and the first defendant. Thus, the burden was on the second defendant to prove that it was indeed a bona fide purchaser and this was a matter best left to be resolved at a trial in which viva voce evidence was led (see para 9).

[Bahasa Malaysia summary

Ini adalah rayuan plaintif terhadap keputusan hakim Mahkamah Tinggi memberikan injunksi menyekat defendan pertama daripada menjual hartanah yang dipersoalkan kepada defendan kedua. Plaintif merupakan penyewa ruang legar dua panggung wayang ('hartanah tersebut') di Sungei Wang Plaza yang dimiliki oleh defendan pertama. Perjanjian penyewaan antara plaintif dengan defendan pertama mengandungi fasal yang memberinya hak pertama menolak sekiranya defendan pertama ingin menjual hartanah tersebut. Panggung wayang tersebut akhirnya ditutup dan defendan pertama menawarkan untuk menjualnya kepada plaintif pada harga RM16j. Walau bagaimanapun, perjanjian untuk menjual hartanah tersebut kepada plaintif ditamatkan atas alasan plaintif tidak mempedulikan tempoh masa yang diperuntukkan dalam fasal perjanjian itu. Plaintif telah mengeluarkan writ dan dengan serentak melalui saman memohon injunksi, yang telah diberikan terhadap defendan-defendan dan akhirnya menjadi perkara pokok rayuan ini. Antara isu-isu yang perlu ditentukan oleh mahkamah adalah bahawa: (i) sama ada berlaku kelewatan melampau memohon injunksi tersebut; (ii) sama ada hakim perbicaraan terlepas perhatian tentang fakta bahawa tidak ada apa-apa yang istimewa tentang

hartanah tersebut; (iii) sama ada kewajipan terletak pada plaintif untuk memperoleh kelulusan daripada pemilik bangunan bagi kerja-kerja yang ingin dilaksanakannya; dan (iv) sama ada defendan kedua merupakan pemilik bona fide dan oleh itu patut dibenarkan meneruskan pembelian hartanah tersbeut.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Dalam kes ini, fakta menunjukkan bahawa hakim tidak mengambilkira kelewatan tersebut sebagai suatu yang bersifat menafikan hak plaintif terhadap relief dan telah menggunakan budi bicaranya dengan sewajarnya. Memandangkan plaintif mempunyai hubungan berterusan dengan defendan pertama, plaintif mempunyai hak untuk enggan memulakan tindakan lebih awal daripada yang telah dilakukannya. Oleh itu, isu kelewatan tidak timbul kerana plaintif telah dengan segera melindungi kepentingannya sejurus selepas jualan hartanah tersebut kepada defendan kedua (lihat perenggan 6).

(2) Dengan mengambilkira keadaan istimewa kes ini, hartanah tersebut sememangnya mempunyai nilai istimewa. Oleh sebab kedudukannya dan kepopularannya dengan masyarakat umum, bangunan itu di mana hartanah tersebut terletak dengan sendirinya memberi nilai istimewa dan begitu juga dengan hartanah tersebut. Oleh itu, tiada merit pada alasan aduan bahawa tiada apa-apa yang istimewa tentang hartanah tersebut (lihat perenggan 7).

(3) Tambahan, adalah jelas daripada keterangan bahawa plaintif telah menulis kepada pemilik, yang telah mengarahkan peguam mereka menjawab surat kepada defendan pertama. Justeru itu tiada merit dalam pendapat yang hakim telah terlepas perhatian tentang fakta bahawa kewajipan terletak pada plaintif untuk memperoleh kelulusan bagi kerja-kerja yang ingin dilaksanakan (lihat perenggan 8).

(4) Bahkan keterangan memang menunjukkan bahawa defendan kedua menyedari transaksi antara plaintif dan defendan pertama. Oleh itu, beban terletak pada defendan kedua untuk membuktikan bahawa ia sememangnya pembeli bona fide dan ini perkara yang elok diselesaikan semasa perbicaraan di mana keterangan viva voce dikemukakan (lihat perenggan 9).]

Notes

For a case on injunction to restrain sale of property generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3083.

Cases referred to

Bhup Narain Singh v Gokhul Chand Mahton LR 61 IA 115 (refd)

Evercrisp Snack Products Sdn Bhd v Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297, HC (refd)

Legislation referred to

Specific Relief Act 1950 s 11(2)

Appeal from: Suit No S1–22–969 of 2007 (High Court, Kuala Lumpur)

Brendan Siva (Aida Heryani with him) (Kadir Andri & Partners) for the appellant in Civil Appeal No W-02–665 of 2007.

Gideon Tan (Gideon Tan Razali Zaini) for the respondent in Civil Appeal No W-02–665 of 2007.

BC Poh (TC Chong & Rakan-rakan) for the appellant in Civil Appeal No W-02–1147 of 2007.

Gideon Tan (Gideon Tan Razali Zaini) for the respondent in Civil Appeal No W-02–1147 of 2007.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is brought against the decision of High Court of Kuala Lumpur whereby it granted an injunction restraining the first defendant from selling or disposing of the property in question to the second defendant. We must begin by stating that there are two appeals before us. They are Civil Appeal No W-02–665 of 2007 and Civil Appeal No W-02–1147 of 2007. Yesterday, we had before us an application in Civil Appeal No W-02–665 of 2007 to extend time to file the record of appeal. In view of the fact that this is an interlocutory matter and time would be saved if we dealt with the merits of the appeal proper especially having regard to the fact that the second defendant had filed his record of appeal we directed the first defendant (the appellant in W-02–665 of 2007) to file a further affidavit enclosing all the cause papers placed before High Court in respect of the application for the injunction. This was done. For convenience we refer to Civil Appeal No W-02–665 of 2007 as the first appeal and W-02–1147 of 2007 as the second appeal.

[3] In the first appeal the primary ground advanced before us is that the learned judge erred in exercising his discretion by failing to take into account certain considerations that were relevant to this case. In order to appreciate the arguments that have been advanced it is necessary to hearken to the facts

of this case in brief terms. The plaintiff (the common respondent in both these appeals) is, and was at all material times, the first defendant's tenant. The tenancy agreement which the plaintiff had with the first defendant contains a clause which gave it a right of first refusal in the event that the first defendant intended to sell the property in question. We must now say a word about the subject property.

[4] Sungei Wang Plaza is a large shopping centre in the hub of Kuala Lumpur's commercial district. It has many shop lots. All sorts of goods are transacted and all sorts of services are available there. It is a notorious fact that Sungei Wang Plaza is a favourite shopping centre for Malaysians as well as foreign tourists. The plaintiff's tenancy was in respect of the foyer of two cinemas owned and managed by the first defendant. Eventually the cinemas closed. The first defendant wanted to sell both the foyer and the space occupied by the cinemas. By a letter dated 17 May 2004, it offered the subject property (that is to say the foyer and the cinemas) to the plaintiff at a price of RM16m. Later, disputes arose as to the respective obligations of the parties with particular regards to para 2(b) of the letter of offer. In essence what that paragraph says is that the sale and purchase agreement between the plaintiff and the first defendant is to be signed within seven days after the owner of the building (Sungei Wang Plaza) has approved the change of use to which the plaintiff proposed to put the subject property after acquiring it. After some correspondence, on 28 December 2005, the first defendant terminated the agreement to sell to the plaintiff on the ground — and we quote from its letter:

> You disregarded the reasonable timeline requested of you in making the application as stipulated in our letter of 5 October 2005 despite your earlier representation that you and/or your advisers are ready, able and willing to apply for the same immediately.

By the same letter, the first defendant sought to return the deposit of RM320,000 which plaintif had paid.

[5] On 14 August 2007 the plaintiff took out a writ and simultaneously by summons moved for an injunction which was granted on 6 December 2007. That is the order which is the subject matter of complaint before us in this appeal. One of the complaints made by both defendants is that there was inordinate delay by the plaintiff in seeking the injunction. In actual terms, there was a delay of more than 19 months. Now it is a general principle of equity jurisprudence that unreasonable delay in seeking specific relief will entitle a court of equity to decline such relief. *Evercrisp Snack Products Sdn Bhd v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297 provides a ready illustration of the application of the principle. This is because courts of equity have acted on the principle that only the vigilant should be aided and not the

indolent. This guideline is embodied in the Latin maxim *vigilantibus non dormientibus jura subveniunt*. But like all principles of equity, the circumstances of each case govern the ultimate exercise of discretion. There may be circumstances when it would be positively unjust to refuse relief merely on the ground of delay. And the paramount consideration of a court of equity has always been the justice of a given case.

[6] On the facts of the present case, the judge does not appear to have considered the delay to have been such a nature to disentitle the plaintiff to relief. We agree with the exercise of discretion so far as this part of the case is concerned. It would in our view be quite unreasonable to expect the plaintiff as the tenant of first defendant to rush off to court the moment the contract was terminated. It had an ongoing relationship with the first defendant. It is a commercial reality that businessman do not wish to create an antagonist relationship in circumstances where there are negotiations on foot for a transaction. One can therefore readily understand; as the learned judge did; the plaintiff's reluctance to commence action earlier than it did. And it must be said in fairness to the plaintiff that soon after it discovered the sale of the subject property to the second defendant it did move swiftly enough to protect its interests. It therefore follows that nothing turns upon the delay point.

[7] Another ground advanced before us is that the learned judge overlooked the fact that there was nothing special about the subject property. It was submitted that the presumption under s 11(2) of the Specific Relief Act 1950 had been rebutted on the facts here. With respect, we do not agree. As we have already said, by reason of its location and its popularity with the general public, the building in which the subject property is located itself carries a special value. So must the subject property itself. Indeed we would go so far as to say that having regard to the special circumstances of this case to which we have already adverted, the subject property is indeed of special value. Accordingly, we find no merit in this ground of complaint.

[8] The third and final point raised in support of this appeal is that the learned judge overlooked the fact that the obligation was upon the plaintiff to obtain approval from the owners of the building namely Sungei Wang Plaza Sdn Bhd for the works it intended to carry out. But it must be said that the evidence discloses that the plaintiff did in fact write to the owners. They in turn instructed their solicitors to reply by letter to the first defendant. There is therefore no merit in this ground of complaint as well.

[9] So far as the second defendant is concerned, the allegation that it is a bona fide purchaser and is therefore not to be prevented from going ahead with its purchase is a matter that is in serious dispute. There is some evidence

to show that the second defendant was in fact aware of the transaction between the plaintiff and the first defendant. In any event, the burden is on the second defendant to prove that it was indeed a bona fide purchaser (see *Bhup Narain Singh v Gokhul Chand Mahton* LR 61 IA 115) and this is a matter that is best left to be resolved at a trial in which viva voce evidence is led.

[10] Taking a step back and looking at the facts and circumstances of this case as a whole, we are satisfied that a reasonable tribunal properly directing itself on the law and upon the material before us would have come to the same conclusion as the learned judge at first instance and would have exercised discretion in like manner. We have said on a number of occasions that in an appeal against the exercise of discretion the initial function of this court is one of review only. We do not possess an original discretion of our own. To succeed, an appellant must demonstrate that the discretion has not been exercised by the primary judge as required by law. That burden has plainly not been discharged by the appellant before us.

[11] For the reasons already given, these appeals must fail. They are dismissed. The appellants must pay the costs of this appeal to the respondent. In the special circumstances of this case, we would permit the admission of two separate items of getting up in the respondent's bill of costs: one against each appellant. The deposits in court shall be paid out to the respondent to account of its taxed costs. All orders of the High Court are hereby affirmed.

Appeals dismissed with costs.

Reported by Ezatul Zuria Azhari